31659

DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-218470 **DATE:** July 11, 1985

MATTER OF: Fairchild Weston Systems, Inc.

DIGEST:

1. Establishment of competitive range does not signify that technical proposals in competitive range are equal, since competitive range consists of all proposals having a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through discussions.

2. Protest challenging selection of higher rated, higher cost proposal is denied where protester makes no showing beyond bare allegation that selection was unreasonable.

3. Protest based on alleged impropriety in solicitation--i.e., evaluating offerors on the basis of their technical proposals as provided in original solicitation, despite contracting agency's subsequent decisions to impose a ceiling on the government's costs and not incorporate technical proposal in contract--is untimely where not filed before due date for best and final offers.

4. Protest challenging awardee's business qualifications concerns agency's affirmative determination of awardee's responsibility which, except in limited circumstances not alleged by protester, GAO does not review.

5. Where protester's Freedom of Information Act (FOIA) request (filed 1 week after award was made) is still pending at contracting agency, potential protest based on information which may be received pursuant to FOIA request will be timely if filed within 10 days of receiving the information.

6. Protest challenging contracting agency's evaluation of protester's technical proposal is untimely where not filed within 10 days of protester's debriefing by agency.

Fairchild Weston Systems, Inc. protests the award of a contract to Robot Defense Systems, Inc. under request for proposals (RFP) No. DAAE07-85-R-R015, issued by the Army for three prototype remote control systems and related material to be used on the Robotic Obstacle Breaching Assault Tank. We deny the protest in part and dismiss it in part.

The RFP was issued on January 18, 1985. Seven offers were received on February 19, all of which were included in the competitive range. Discussions were held with all offerors from March 13-16, with best and final offers due on March 25. Award to Robot Defense Systems was made on April 5.

The RFP originally solicited proposals on a cost-plus-fixed-fee (CPFF) basis; six offerors submitted proposals on a CPFF basis, and one submitted a proposal based on cost sharing between the government and the offeror. During discussions, the Army notified all offerors that it had decided to revise the proposed method of contracting under the RFP in order to avoid a potential funding problem. Specifically, the Army decided that proposals could be submitted on either a CPFF or a cost-sharing basis, but had to include a ceiling on the government's liability under the contract.

The Army also notified the offerors by letter dated March 20 that their best and final offers were to be submitted in the form of a completed model contract, copies of which had been provided to each offeror. The Army also stated that an offeror's technical proposal would not be incorporated by reference into the model contract. According to the Army, the decision not to incorporate proposals was made to ensure that offerors recognized that their best and final offers had to conform to the specifications in the model contract, which made several changes to the RFP.

The evaluation criteria were set out in section M.5 of the solicitation. Offerors were required to submit a technical and management proposal, and a separate cost proposal. Four elements in the technical proposals were to be evaluated, with the first, performance, designated as considerably more important than the other three elements, producibility, system integration and delivery schedule. Section M.5.4 of the RFP provided that technical proposals "were significantly more important" than cost proposals in the evaluation.

The Army made award to Robot Defense Systems based on its view of the superiority of that firm's technical proposal, offered at what the Army determined was an affordable cost. The awardee received the second highest technical score, 77.9 out of 100 possible points. The highest rated offeror (with a score of 80 points) was not eligible for award because it refused to specify a ceiling on the government's share; the other five offerors received technical scores ranging from 75.4 to 70.8 points, with Fairchild receiving the next to lowest score, 72.5 points. In addition, the awardee offered the second lowest cost proposal, $1,893,090. The other offerors' cost proposals ranged from $2.9 million to Fairchild's ceiling of $1,249,429.

Fairchild's principal contention is that it should have received award of the contract because it offered a lower cost proposal than the awardee. In support of this position, Fairchild first argues that since both the awardee and Fairchild were included in the competitive range, their technical proposals should be considered equal and award therefore should be made to the offeror proposing the lowest cost. We disagree.

The competitive range in a negotiated procurement consists of all proposals that have a reasonable chance of being selected for award, including deficient proposals that are reasonably susceptible of being made acceptable through discussions. See KET, Inc., B-190985, Dec. 21, 1979, 79-2 CPD ¶ 429; Federal Acquisition Regulation (FAR) § 15.609(a), 48 C.F.R. § 15.609(a) (1984). Thus, establishment of a competitive range in no way signifies that

the technical proposals of the offerors in the competitive range have received equal ratings; on the contrary, the awardee here received a higher rating for its technical proposal.

Further, the agency's decision to select a higher rated technical proposal instead of Fairchild's lower rated, lower cost proposal was consistent with the evaluation scheme in the RFP, which provided that technical considerations were significantly more important than cost. Where, as here, the agency makes cost/technical tradeoffs, the award selection need only be rationally based and consistent with the evaluation criteria. Gray Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. The determining element is the considered judgment of the procurement officials regarding the significance of the difference in technical merit among the offerors. Columbia Research Corp., 61 Comp. Gen. 194 (1982), 82-1 CPD ¶ 8. Our Office will question that judgment only upon a clear showing of unreasonableness. American Coalition of Citizens with Disabilities, Inc., B-205191, Apr. 6, 1982, 82-1 CPD ¶ 318.

Here, the awardee received the second highest technical rating (with the highest rated offeror not eligible for award), while proposing a cost ceiling second only to the Fairchild proposal, which received the second lowest technical rating. In selecting the awardee, the contracting officer enumerated various desirable features of the awardee's proposal, such as the low weight of its proposed unit, the design of its vehicle controls, the proposed use of a subcontractor with "excellent" EMP/EMI loading experience and the use of a simple switch to convert from manual to remote control, under each of the four technical factors listed in the evaluation criteria. Based on this evaluation, he concluded that Robot Defense Systems' proposal offered significant advantages on technical grounds, at an affordable cost. In our view, selection of Robot Defense Systems was consistent with the evaluation criteria in the solicitation, which specified that technical considerations were considerably more important than cost, and Fairchild has made no showing, other than its bare allegation, that selection of the

awardee's higher rated, higher cost proposal was unreasonable.

Fairchild next argues that the Army's decision to require offers to include a ceiling on the government's liability in effect converted the proposed contract into a fixed-price contract, which should have been awarded on the basis of cost proposals alone. In addition, in its comments on the Army's report, Fairchild argues that the Army's decision to impose a funding ceiling constituted a fundamental change in the procurement which required canceling the RFP.[1]/

Fairchild also argues that as a result of the Army's decision not to incorporate technical proposals in the contract, the awardee is not bound to follow the specific technical approach offered in its proposal. As a result, Fairchild argues, it was improper for the Army to award the contract as it did, based primarily on the awardee's higher technical rating, since there was no requirement in the contract that the awardee actually follow the approach on which its higher technical rating was based.

Fairchild's arguments are based on inconsistencies which Fairchild perceives between the original evaluation scheme, on the one hand, and the Army's subsequent decisions, first, to impose a funding ceiling, and, second, not to incorporate the awardee's technical proposal in the contract. As discussed above, the Army decided not to incorporate the technical proposal in the contract in order to ensure that offerors recognized that their best and final offers had to conform to the specifications in the model contract, which contained several changes to

---

[1]/Fairchild also contends that only its proposal came within a $1.3 million limit imposed by the Army on the government's liability under the contract. As indicated in section B.3 of the contract, however, the $1.3 million amount refers only to the funds available for the contract in fiscal year 1985; the remaining amount required will be allotted to the contract beginning in fiscal year 1986.

the specifications in the RFP. This decision was consistent with the primary focus of the evaluation criteria on an offeror's capability to devise a successful technical approach for producing equipment meeting the Army's needs.

The Army's plans were evident to Fairchild before best and final offers were due on March 25; specifically, the Army's decision to impose a cost ceiling was communicated to Fairchild during discussions on March 15, and the decision not to incorporate technical proposals in the contract was made clear in the Army's March 20 letter to all offerors soliciting best and final offers. The March 20 letter also repeated the Army's plan to impose a cost ceiling. Thus, any alleged inconsistencies in the solicitation likewise should have been apparent to Fairchild when it was notified of the Army's plans.

Moreover, the basis of this part of Fairchild's protest is the alleged inconsistency in the Army's evaluation and award scheme as set out in the original solicitation and the March 20 letter, not any subsequent action by the Army inconsistent with that scheme. On the contrary, the Army's actions in making the award were entirely consistent with its announced evaluation plan; it required offerors to specify a cost ceiling, evaluated technical proposals, and did not incorporate the awardee's proposal in the contract, all as indicated to the offerors during negotiations and when best and final offers were solicited.

Despite its awareness of the Army's amended evaluation and award scheme, Fairchild did not file a protest before the due date for best and final offers; instead, Fairchild submitted its best and final offer without objecting to the inconsistencies which it now asserts were contained in the solicitation. A protester who wishes to protest what it perceives as improprieties in a solicitation, however, may not simply wait to see if it receives the contract award before filing its protest. Rather, under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), in a negotiated procurement, alleged improprieties which do not exist in the initial solicitation but which are subsequently incorporated in the solicitation, must be protested not later than the next closing

date for receipt of proposals following the incorporation. Here, the next closing date would have been the date set for receipt of best and final offers, March 25. Since Fairchild did not file its protest until April 9, its protest on these grounds is untimely. See Steward & Stevenson Services, Inc., B-213949, Sept. 10, 1984, 84-2 CPD ¶ 268.

Finally, in its comments on the agency report, filed on May 31, Fairchild for the first time challenges the agency's evaluation of both its and the awardee's proposals. Fairchild first maintains that the awardee could not be rated as a qualified offeror since it has been in business for only 2 years, had operating losses in 1983 and 1984, and apparently was insolvent at the end of 1984. Fairchild's argument in essence constitutes a challenge to the Army's affirmative determination of the awardee's responsibility, a determination which our Office does not review except where there is a showing of possible fraud or bad faith on the part of the contracting officials or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. See 4 C.F.R. § 21.3(f)(5); Environmental Aseptic Services Administration, B-218239, Mar. 5, 1985, 85-1 CPD ¶ 276. Fairchild does not argue that either of these exceptions applies here. In addition, whether the awardee actually will perform in accordance with the RFP is a matter of contract administration for the contracting agency which our Office does not review. See 4 C.F.R. § 21.3(f)(1); Window Supply Co., B-218043, Jan. 28, 1985, 85-1 CPD ¶ 112.

Fairchild also states that it submitted a request dated April 12 to the Army under the Freedom of Information Act (FOIA) for information regarding the award to Robot Defense Systems. Fairchild suggests that the information requested may provide a basis for challenging the Army's technical evaluation of the awardee's proposal. The FOIA request is still pending at the Army. Based on our in camera review of the source selection materials which the Army has provided to us in connection with this protest, we find no indication that the Army deviated from the evaluation scheme in its rating of the awardee's

proposal. However, if Fairchild receives information pursuant to its FOIA request which provides a basis for challenging the Army's technical evaluation, Fairchild may file a protest based on that information within 10 days of receiving the information. Tracor Jitco, Inc., B-208476, Jan. 31, 1983, 83-1 CPD ¶ 98.

Fairchild also argues that the agency's evaluation of its own technical proposal was improper in various respects. This contention is based on information Fairchild received from the Army at a debriefing on May 6. Fairchild did not raise this ground of protest until its comments on the Army's report were filed on May 31, and the Army thus had no opportunity to respond to Fairchild's detailed challenges to its evaluation of the protester's proposal. In any event, under our regulations, 4 C.F.R. § 21.2(a) (2), a protest must be filed within 10 days after the date when the basis for protest is or should have been known; in this case, that date was May 6, when the debriefing was held. Since Fairchild did not raise this issue until its comments filed on May 31, more than 10 days after the debriefing, its protest on these grounds is untimely. See Sperry Flight Systems, B-212229, Jan. 19, 1984, 84-1 CPD ¶ 82.

The protest is denied in part and dismissed in part.

for Seymour Efros
Harry R. Van Cleve
General Counsel